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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Petitioner,

vs.

LUIS CARLOS ARANGO, a/k/a
CARLOS LUIS ARANGO,
Florida Inmate No. 075042,

Respondent.

On Petition for a Writ of Certiorari
to the United States
Court of Appeals
for the Eleventh Circuit

BRIEF OF PETITIONER ON JURISDICTION

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QUESTIONS PRESENTED

I

WHETHER THE UNITED STATES COURT OF APPEAL CAN CAN VACATE A PROPERLY ENTERED JUDGMENT OF A UNITED STATES DISTRICT COURT ON A STATE PRISIONER PETITIONER'S FEDERAL HABEAS CORPUS PETITION, WITHOUT REACHING THE MERITS, AND ORDER THE DISTRICT COURT TO HOLD THE PETITION IN ABEYANCE UNTIL THE STATE PETITIONER HAS EXHAUSTED OTHER CLAIMS PENDING IN THE STATE COURTS?

II

WHETHER A UNITED STATES DISTRICT COURT ABUSES ITS DISCRETION WHEN IT DENIES A PETITIONER'S MOTION FOR CONTINUANCE AND DECIDES THE ISSUES IN AN EXHAUSTED HABEAS CORPUS PETITION ON THE MERITS, IN LIEU OF HOLDING THE PETITION IN ABEYANCE UNTIL OTHER CLAIMS PENDING IN STATE COURT HAVE BEEN EXHAUSTED, THEREBY LEAVING THE HABEAS CORPUS PETITIONER TO THE RISKS OF A SECOND FEDERAL PETITION ON THE NEW CLAIMS?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at Arango v. Wainwright, 716 F.2d 1353 (11th Cir. 1983). (A 63-75).[1] The opinion of the United States Court of Appeal for the Eleventh Circuit on Petition for Rehearing and Suggestion for Rehearing En banc is not yet reported and is contained in the appendix. (A. 88-96). The opinion of the United States District Court for the Southern District of Florida is reported at Arango v. Wainwright, 563 F.Supp. 1353 (S.D. Fla. 1983). (A. 1-62; 80-87)

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[1] The symbol "A" is used to designate the appendix to this brief.

The opinions[3] of the Supreme Court of Florida are reported at Arango v. State, 411 So.2d 172 (Fla. 1982). (A. 130-138). Arango v. State, 437 So.2d 1099 (Fla. 1983) (A. 98-129).

II

JURISDICTION

On September 23, 1983, the United States Court of Appeals for the Eleventh Circuit reversed the ruling of the United States District Court for the Southern District of Florida denying Respondent's Petition for Writ of Habeas Corpus filed pursuant to 28 U.S.C. § 2254. Petitioner filed a Petition for Rehearing and Suppresion for Rehearing En Banc. On July 31, 1984, the Court denied the petition and suspension.

The jurisdiction of this Honorable Court is invoked pursuant to the provisions of Rule 17 of the Rules of

the Supreme Court and Title 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

The Respondent, Luis Carlos Arango a/k/a Carlos Luis Arango is presently in the custody of Petitioner Louie L. Wainwright, Secretary, Florida Department of Corrections, pursuant to a valid judgment of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. Respondent was convicted , after trial by jury, of first degree murder and possession of cocaine. He was sentenced to death by electrocution as to the murder conviction and to a term of five years' imprisonment in the state penitentiary, to run concurrently. (A. 64-76).

Respondent appealed from his conviction to the Supreme Court of Florida. The Court affirmed Respondent's convictions and sentences. Arango v. State, 411 So.2d 172 (Fla. 1982). This Court denied a

petition for writ of certiorari filed by Petitioner. Arango v. Florida, ___U.S.___, 102 S.Ct. 2973(1982).

On September 29, 1980., while Respondent's direct appeal was pending, he joined other death row inmates in filing for habeas corpus relief based upon the allegation that the Florida Supreme Court had received and reviewed extra-record information concerning capital defendants. The Florida Supreme Court denied the petition and this Court denied review. Brown v. Wainwright,392 So.2d 327 (Fla.), cert. denied, 454 U.S. 1000(1981).

On January 3, 1983, Respondent filed a motion for post-conviction relief in the state trial court. No hearing was requested the motion until after the Governor of Florida had signed a death warrant. The Florida Supreme Court stayed Respondent's

execution.

The respondent subsequently filed an exhausted petition for writ of habeas corpus in the United States District Court for the Southern District of Florida. On May 6, 1983, the district court entered a final order and memorandum opinion denying the petition. The Supreme Court of Florida rendered its decision on appeal from the denial of the motion for post-conviction relief. (See A. 98-129).

Appellate proceedings from the district court's denial of the habeas corpus ensued. The United States Court of Appeals reversed and vacated the district court's order. Arango v. Wainwright, 716 F.2d 1353 (11th Cir. 1983). The State's Petition for Rehearing and Suggestion for Rehearing en banc was subsequently denied. (A64-76).

IV

REASONS FOR GRANTING CERTIORARI

I. THE DECISION OF THE COURT OF APPEALS IS IN EXPRESS CONFLICT WITH THE COURT'S DECISIONS IN ROSE V. LUNDY, 455 U.S. 509 (1982) AND BAREFOOT V. ESTELLE, ___ U.S. ___, 103 S.Ct. 3383 (1983).

The United States District Court for the Southern District of Florida was presented, in the instant case, with an exhausted petition for a writ of habeas corpus filed pursuant to Title 28 U.S.C. § 2254 by a state prisoner sentenced to death. The petitioner below (Respondent) filed a motion for continuance of the proceedings

in the district court on the grounds that other claims were pending in the state court. The motion was denied and a hearing was held as to the exhausted petition. The district court subsequently entered a memorandum order denying the petition. (A.

In reviewing, on appeal, the propriety of the district court's order, the United States Court of Appeals for the Eleventh Circuit, vacated and reversed the district court's ruling holding that the federal habeas corpus proceeding should be held in abeyance, in the

interest of judicial economy. Arango v. Wainwright, 716 F.2d 1353, 1355 (11th Cir. 1983). (A. In its opinion, the appellate court recognized that the petition before the distrcit court was exhausted and that if Respondent had included the unexhausted claims, the district court would have had to dismiss the petition. The court cited to Rose v. Lundy, 455 U.S. 509, 520 (1982) and acknowledged that failure to include unexhausted claims could cause the Respondent to lose the opportunity to litigate the unexhausted claims in the future. The court ultimately reached a

contrary conclusion, however, and held that Respondent had not waived the claims asserted in state court. The court went on to conclude that the state court proceedings could potentially moot out the federal proceedings because past experience in death cases indicated that if relief is denied in the state court, Respondent would assert those claims in a successive petition in federal court and would probably incorporate some of the claims asserted in the exhausted petition, and that since there was no time limit within which such a successive petition would be filed, issues considered in the instant appeal might require

reconsideration on a second petition.[13]

Although the United States Court of Appeals for the Eleventh Circuit acknowledged this court's decision in Rose v. Lundy, supra, in its opinion, its ultimate conclusion is nonetheless contrary to this court's dictates in that case. Contrary to the court's assertion in its denial of Petitioner's Petition for Rehearing and Suppression for Rehearing En Banc, the court's opinion has the effect of allowing a state petitioner in a death case to circumvent the rules expressed in Rose v. Lundy, through the use of dilatory tactics.

Under the opinion of the Eleventh Circuit, a state petitioner in a death case may delay bringing his collateral attack on his conviction and sentence in state courts and then due to an outstanding death warrant, go to federal court for a stay of execution in order to continue the proceedings until after the state proceedings have concluded.

The above import of the case is that it deprives district court's in the circuit from acting within their discretion in ascertaining whether the standards of Rose v. Lundy, supra, have been met. In

Rose v. Lundy, supra, this court specifically quoted pertinent language from its decision in Sanders v. United States, 373 U.S. 1, 18 (1963); noting that:

> ...Nothing in the traditions of habeas corpus requires the federal court to tolerate needless piecemeal litigation or to entertain collateral proceedings whose only purpose is to vex, harass, or delay.

In fact, the State Supreme Court condemned tactics of Respondent's counsel in this particular case in waiting until the "midnight hour" in raising the "new" claims in question. Arango v. State, 437 So.2d 1099 (Fla. 1983).

Thus, the opinion of the United States Court of Appeals for the Eleventh Circuit as it presently stands does provide a means by which this Court's dictates in Rose v. Lundy, can be circumvented. The cases are therefore in conflict and this Court is urged to accept jurisdiction over this case in order to resolve the inconsistency between the two cases.

Respondent further submits that the federal appellate court's decision in this case is contrary to this court's pronouncements in Barefoot v. Estelle, ___U.S.___, 103 S.Ct. 3383 (1983). In Barefoot v. Estelle, supra, this court stated that federal courts are not forums in which to

relitigate state trials and that even less is federal habeas a means by which a defendant is entitled to delay an execution indefinitely. The Eleventh Circuit's opinion on rehearing states that this case was based on "unusual circumstances." This Court has made it clear that the nature of the sentence imposed should not change the scope of the court's analysis. The Eleventh Circuit's opinion is therefore clearly contrary to this court's pronouncements in Barefoot v. Estelle, supra, and Petitioner urges this Court to resolve said conflict.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT IS IN CONFLICT WITH THE SAME COURT'S DECISION IN THOMPSON V. WAINWRIGHT,714 F.2d 1495 (11th Cir . 1983).

The decision of the United States Court of Appeals in the instant case is in conflict with the same Court's decision in Thompson v. Wainwright, 714F.2d 1495 (11th Cir. 1983) cert. denied ____U.S.___(Case No. 83-1421; Opinion filed May 2, 1984)[35 Cr.L. 4029]. The converse factual situation was presented in Thompson, supra. In Thompson, the petitioner was a death row inmate who had filed an exhausted petition for writ of habeas corpus and a motion for continuance due to

pendency of claims in state court. The State objected to the continuance and attempted to waive any exhaustion challenge to the pending claims. The Court held that a district court can grant a continuance, in its discretion, and tht it was within the Court's discretion to either accept or reject the State's waiver. In Thompson, supra, the Court stated:

> The district court could have denied a delay, decided the issues that were alleged in the petition, and left Thompson to the risks of a second federal petition on the two claims. But no rule or policy required it to do so.
>
> 714 F.2d 1500.

In accordance with Thompson, supra, the distict court could have properly denied the motion for continuance without abusing his discretion . It

would then be in the habeas petitioner's discretion to assume the risks of filing a second federal petition. It was not an issue before the Court to decide whether the filing of a subsequent petition would constitute an abuse of the writ. It is readily apparent that the instant opinion is inconsistent with Thompson and that the issues presented herein are of significant national importance. This Court is therefore urged to grant the writ of certiorari sought herein.

V

CONCLUSION

This Court is therefore urged to accept this case to resolve the conflict concerning the instant issues of compelling national importance.

RESPECTFULLY SUBMITTED on this _____day of 1984, at Tallahassee, Florida.

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APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-1077-CIV-EPS

LUIS CARLOS ARANGO a/k/a
CARLOS LUIS ARANGO,
Florida Inmate No. 075042,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.
_____/

ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS,
VACATING STAY OF EXECUTION
AND MEMORANDUM OPINION

THIS CAUSE came before the Court on Petition for Writ of Habeas Corpus filed on behalf of Petitioner, LUIS CARLOS ARANGO a/k/a CARLOS LUIS ARANGO

(Arango) pursuant to Title 28, United States Code, Section 2254. Arango raised several constitutional grounds for relief. However, this Court finds no merit in Arango's petition and, therefore, it is dismissed. Moreover, in light of this decision dismissing the petition for writ of habeas corpus, the say of execution heretofore entered on April 27, 1983 is vacated.

I. BACKGROUND

Arango was convicted in the Circuit Court of the Eleventh Judicial Circuit, in and for

Dade County, Florida, of first degree murder and possession of a controlled substance. Petitioner was sentenced to death by electrocution on the first degree murder conviction, and to a term of five (5) years imprisonment in the state penitentiary on the conviction for possession of cocaine, this latter sentence to run concurrently.

On direct appeal to the Florida Supreme Court, Arango raised the following issues: that the trial court (improperly denied his motion to suppress evidence obtained as the result of an unlawful, warrantless entry into his apartment; that the

trial Court's instruction to the jury at the penalty phase unconstitutionally shifted to him the burden of proving that the mitigating circumstances outweighed the aggravating circumstances; that the trial court's instructions of the "especially heinous, atrocious or cruel" aggravating circumstances was inadequate and the trial court refused to give instructions properly defining these terms; that the trial court erred in allowing the prosecution to introduce the irrelevant and inflamatory testimony of the medical examiner to prove the applicability of the terms heinous, atrocious or cruel; that

the death penalty was a disapro-portionate punsishment; and that the trial court improperly excused a venireman for cause over defend-ant's objection in violation of Witherspoon v. Illinois, 391 U.S. 510 (1968). The Florida Supreme Court affirmed both the convictions and the sentence. Arango v. State, 411 So.2d 172 (Fla. 1982), and the United States Supreme Court declined to review that decision. Arango v. Florida, ____ U.S. ____, 102 S.Ct. 197 (1982).

During the pendency of Petitioner's direct appeal, Arango joined with numerous other death row

inmates in filing an application for extraordinary relief and petition for habeas corpus based on the allegation that the Florida Supreme Court had a practice of reviewing ex parte, non-record information concerning capital defendants, mental health and personal background. The Supreme Court of Florida denied relief, Brown v. Wainwright, U.S._____, 102 S.Ct. 542 (1981).[1]

Governor Graham signed Arango's death warrant on April 6, 1983. Pursuant to this warrant, the execution was to be scheduled "some day of the week beginning

noon, Friday, the 29th day of April, 1983, and ending noon, Friday, the 6th day of May, 1983...."

On April 27, 1983, a Petition for Writ of Habeas Corpus, Application for Stay of Execution and Motion for Continuance was filed on behalf of Arango in the United States District Court, Southern District of Florida.[2] This Court immediately held a hearing. Counsel for Arango indicated to this Court that although the execution is scheduled for 7:00 a.m., May 3, 1983, the Superintendent of Prisons has the

authority to execute Arango at any time subsequent to April 29, 1983. Counsel further indicated that an application for stay of execution was denied by the Florida Supreme Court.

Because of this Court's concern over the possibility of the Superintendent of Prisons exercising his authority before all the issues in this Petition could be addressed, this Court granted the application for stay of execution until 6:59 a.m., May 3, 1983. This stay was in no way intended to interfere with any pending state court matters

and to this Court's knowledge it does not. However, this Court further indicated that, if it becomes necessary, upon the filing of any additional petition for writ of habeas corpus subsequent to oral argument before the Florida Supreme Court on May 2, 1983, an immediate hearing would be convened.

On April 30, 1983, this Court conducted a full hearing on all the issues raised in Arango's Petition for Writ of Habeas Corpus including an evidentiary hearing on the issue that has come to be known as the Ford v. Strickland issue, infra, (see also Brown v.

Wainwright, supra). All the issues that were presented to this Court for review had been presented to the Florida Supreme Court either on direct appeal or by petition for writ of habeas corpus. Therefore, this Court found and the State stipulated, that Arango had exhausted all of his state court remedies for the purpose of the present petition for writ of habeas corpus and regardless of the petition for writ of habeas corpus and appeal pending before the Florida Supreme Court, this Court was not presented with a mixed habeas corpus petition. See Rose v. Lundy, _____U.S._____, 102 S.Ct. 1198 (1982).

As heretofore noted, this Court finds no merit to Arango's Petition. Arango raised basically six (6) constitutional errors in the State court. These alleged constitutional errors were fully and fairly reviewed by this Court and found to contain no merit.

II. ANALYSIS

A.) THE BROWN ISSUE: NON-RECORD MATERIAL BEFORE THE FLORIDA SUPREME COURT

Arango raised as the first ground of this Petition that his constitutional rights were violated when the Florida Supreme Court requested, received and reviewed information

which was not part of the trial record or the record on appeal of his case or the cases of his fellow death row inmates. In regard to this contention, Arango requested this Court to conduct an evidentiary hearing. Over the objection of the Attorney General, this Court granted the evidentiary hearing and the exhibits attached to Arango's Petition for Writ of Habeas Corpus were accepted into evidence. These exhibits consist of the Petition for Writ of Habeas Corpus in Brown v. Wainwright and other various exhibits such as the appendices to the Petition and other exhibits referencing the

Clerk of the Florida Supreme Court's requesting and receiving non-record material.

Arango next requested to take the testimony of the Clerk and staff of the Florida Supreme Court regarding two areas: (1) the possibility that the requested records had not been destroyed as asserted in the Brown petition and (2) whether with regard to Arango a request for non-record material was made regardless of no material being received. The Court denied the above request.

As to whether the requested records had been destroyed, the

Court notes that Arango was a member of that group of prisoners who originally joined Brown in challenging the constitutionality of their sentences to death. On page three (3) of that original petition the last paragraph of Section III - FACTUAL BASIS FOR RELIEF - it is stated:

> Upon information and belief, a quantity of the information received by the Court, and of records reflecting the practice of requesting and receiving it as alleged in the preceeding paragraph and receiving it as alleged in the preceeding paragraph, has at the Court's direction been destroyed or purged from this Court's files. As a result, it is no longer possible for petitioners

to identify all of the cases in which such information was requested or received.

In addition, Petitioner's counsel admitted that no evidence exists to indicate that such records had not been destroyed as alleged.

Therefore, such a request belies the allegation made in the petition wherein the petitioner not only acknowledges that the documents were destroyed but actually alleges it.

The second area concerns whether the Clerk of the Supreme Court in fact requested non-record

information. As with the first area, the Court finds such an inquiry irrelevant.

Arango claimed that the mere request of such information regardless of whether the Florida Supreme Court actually relied upon the non-record information creates the appearance of impropriety and that in capital cases where the petitioner's life is at stake, federal law guarantees petitioner a full and fair review of his death sentence free from even the appearance of impropriety. Arango contended that his fundamental right of due process of law was abridged because under the circumstances the avail-

ability to the Court of prejudicial material creates an appearance of impropriety thereby tainting the the entire pool of defendants in Brown v. Wainwright and specifically him.

The Court finds that the above analysis defies logic. During the evidentiary hearing the following dates were proffered to the Court and accepted as accurate by Petitioner: on September 2, 1980, Arango filed his Notice of Appeal to the Florida Supreme Court on his direct appeal. The Court does not believe that the mere filing of that Notice of Appeal alerted

the Justices of the Florida Supreme Court to the nature of that appeal. Twenty seven days later on September 29, 1980, the Petition for Writ of Habeas Corpus was filed in Brown v. Wainwright. On January 12, 1981, the Attorney General's office received the record on Arango's direct appeal and on or about that date, the Florida Supreme Court received it. Three days later on January 15, 1981, the Florida Supreme Court decided Brown v. Wainwright, 392 So.2d 1327 (1981).

As noted by the Eleventh Circuit in Ford v. Strickland, 696 F.2d 804 (1983), the Florida Supreme Court held in Brown that

state law does not permit the use of non-record material in the appellate review of a capital sentence. Id. at 810. The Eleventh Circuit Court of Appeals then quoted the following passage from Brown:

> [A]s a matter of law our view of the non-record information petitioners have identified is totally irrelevant either to our appellate function in capital cases as it bears on the operation of the statute, or to the validity of any individual death sentence... .
>
> * * *
>
> The record of each proceeding, and precedent, necessarily frame our determinations in sentence review.... Factors or information outside the record play no

part in our sentence review role.

Brown v. Wainwright, 192 So.2d at 1331-1332.

On March 3, 1981, Arango filed his appellate briefs in the direct appeal and the Attorney General of the State of Florida responded on May 18, 1981. Oral argument took place on August 31, 1981. The Florida Supreme Court decided Arango's direct appeal on January 31, 1982, more than a year after the Brown decision.

At the time the Court considered Arango's appeal, the Brown case had already been decided. This Court must assume that the Florida State Supreme Court followed Brown and

did not review non-record information in Arango's case. In this case, not only does it appear by virtue of the dates at issue that the material was not viewed in Arango, but there has been no indication that any non-record information existed as to Arango. The exhibit offered by Petitioner in evidence clearly states that none existed.

This brings the Court to the issue of whether by merely requesting and receiving the information referred to in Brown, supra, relating to other defendants, an appearance of impropriety was

created tainting the entire pool of defendants in Brown v. Wainwright and particularly the Petitioner in perpetuity.

In light of the statement in Brown, supra, that view of non-record information would be totally irrelevant to the Court's role in sentence review, and the further indication by the Florida Supreme Court that such information was used for some other purpose, Brown v. Wainwright, 392 So.2d 1327, 1333 n. 17 (1981), the Court cannot find any merit with this second contention.

As to the Ford v. Strickland, issue (Brown v. Wainwright in the Florida Supreme Court), the following findings of fact and conclusions of law based on the record before this Court are made:

1. That, on September 29, 1980, the date of the original application for emergency releif and petition for habeas corpus which has come to be known as Brown v. Wainwright and in which the Petitioner was a named Petitioner represented by counsel, said application clearly reflected that whatever material is referred to in Brown v. Wainwright had in fact already been destroyed by the Clerk of the Supreme Court of Florida.

2. That none of the material regardless of when destroyed contained information pertaining to the Petitioner Arango.

3. That the first occasion that the Petitioner sought direct appellate review of his capital conviction in the Supreme Court of Florida was on September 2, 1980, only twenty seven days prior to the filing of the original application and petition for habeas corpus in Brown v. Wainwright (which the Court already notes cont ained an allegation by the Petitioner that the material complained of had already been destroyed).

4. That the record on the direct appeal of the Petitioner was filed with the Florida Supreme Court on or about January 12, 1981.

5. That on January 15, 1981, the Court issued its opinion in Brown v. Wainwright in which it is affirmatively stated by the Court that such material was not used as asserted in the original application and petition for writ of habeas corpus.

6. That Arango's appellate brief in the direct appeal was filed with the Court on March 3, 1981 and the State's response thereto on May 18, 1981.

7. That oral argument on Petitioner's direct appeal was on August 31, 1981 and the opinion and decision of the Florida Supreme Court affirming his capital conviction issued on January 21, 1982.

8. That the sole material offered at the evidentiary hearing was the exhibit of the Brown v. Wainwright proceeding and the date that each of the appellate functions occurred regarding the direct appeal which dates have been stipulated to by the parties as accurate. In addition, as alluded to earlier, the Petitioner requested the opportunity of deposing the Clerk of the Florida

Supreme Court or his staff for the sole purpose of determining two issues: (1) whether or not in fact such material had been destroyed (this request was denied because it belies the very allegations of the petition in the original application in Brown v. Wainwright, supra); and (2) whether or not any material had ever been requested by the Clerk pertaining to the Petitioner Arango although the record clearly reflects that no such material was ever received (this the Court considered then and considers now insofar as this Court's determination to be immaterial).

9. Although this Court did not consider an evidentiary hearing essential to a determination of the issue framed in Ford v. Strickland (Brown v. Wainwright), in an abundance of caution, this Court granted such evidentiary hearing. Based upon the aforesaid findings of fact which are uncontradicted in the record, the reasons for denial of said relief on this ground are stronger than before.

10. That this Court takes judicial notice of the fact that the mere filing of a notice of appeal or a record on appeal absent a contrary showing, does not evidence any

awareness or knowledge on the part of Justices of the Supreme Court of Florida as to the nature of the issues framed or the contents of said record on appeal prior to the same being presented by way of briefs or oral argument.

11. That the existence of said material as it pertains to the Petitioner and his direct appeal could have at best existed for a period of twenty seven days (September 29, 1980, date of original application; September 2, 1980, date of original notice of appeal on direct appeal).

12. That there is no evidence whatsoever to establish that whatever materials were before the Supreme Court of Florida in any form or fashion affected the decision of the Supreme Court of Florida in affirming the Petitioner's appeal one year and six days after the filing of their opinion in Brown v. Wainwright (January 15, 1981, Brown v. Wainwright opinion; January 21, 1982, affirmance opinion in direct appeal at Arango's conviction.)

13. This record is totally devoid of any facts of whatsoever kind or nature which would indicate that

there was an appearance of impropriety as pertains to said Petitioner and the handling of his direct appeal by the Florida Supreme Court. This Court finds as a matter of fact and law that no such appearance existed nor was his direct appeal in any way tainted by the assertions and allegations made in the case of Brown v. Wainwright.

14. This Court specifically finds against the assertion by the Petitioner that there should be an inference drawn that since such material was in some form or fashion before the Supreme Court of Florida as pertains to other Defendants, that the Court should not only disregard the opinion of the Florida Supreme Court as pertains to

such other defendants but in some way should draw the conclusion that this Petitioner on his direct appeal was deprived of due process of law in a full and fair consideration of his appeal by that Court. This Court does specifically find that the assertion made by said Court in their opinion in Brown v. Wainwright would certainly hold true and should be afforded due consideration by way of that Court subsequently deciding the appeal of an individual appellant over a year later in which no material of any kind pertaining to said petitioner was ever before said Court.[3]

Based upon the above and foregoing findings of fact and conclusions of law, the Court finds as a matter of law that the stay heretofore issued by Justice Powell of the United States Supreme Court on April 15, 1983 pertaining to the mandate in Ford v. Strickland has no application to the facts of this case and to the Petitioner herein.

B. THE WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968), VIOLATION

Arango contends "that he was denied his right to a fair trial by an impartial jury drawn from a cross-section of the community when one of the venire members, Mr. Alvarez, was

excused for cause in violation of the precepts of Witherspoon v. Illinois, 391 U.S. 510 (1968)."

In Witherspoon, the Court held "that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522.

In Adams v. Texas, 448 U.S. 38 (1980), the Court discussed a line of cases that established the following general proposition:

> That a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his oath. The State may insist, however, that jurours will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Id. at 45.

> Moreover, the law is clear that a state has the power to:
>
> [e]xecute a defendant sentenced to death by a jury from which the only veniremen who were in fact excluded for cause were those who made unmistakably clear (1) that they would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial

> of the case before them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Darden v. Wainwright, 699 F.2d 1031, 1037 (11th Cir. 1983), quoting Adams v. Texas, 448 U.S. 38, 44 (1980), quoting Witherspoon v. Illinois, 391 U.S. at 522-23, n. 21 (1968).

In deciding this issue, the Court finds it necessary to examine the entire voir dire examination.[4] Darden v. Wainwright, 699 F.2d 1031, 1038 (11th Cir. 1983). Based on this Court's review of the entire voir dire examination of Mr. Alvarez, it appeared that although Mr. Alvarez seemed unsure about what was being

asked of him, the ultimate conclusion to ge drawn from the examination is that his attitude toward the death penalty would interfere with his making an impartial decision as to Arango's guilt. Moreover, in this Court's opinion such a determination is "unmistakably clear", Darden v. Wainwright, 699 F.2d 1031, 1037 (11th Cir. 1983), and therefore, Mr. Alvarez' ability to perform his duties as a juror were substantially impaired.

C. JURY INSTRUCTIONS UNCONSTITUTIONALLY SHIFTED TO ARANGO THE BURDEN OF PROVING THAT THE MITIGATING CIRCUMSTANCES OUTWEIGHED THE AGGRAVATING CIRCUMSTANCES.

Arango alleges as his third

ground that "the instructions to the jury at the penalty phase unconstitutionally shifted to Mr. Arango the burden of proving that the mitigating circumstances outweighed the aggravating circumstances, thus violating his rights to due process of law and to be free from cruel and unusual punishment under the Fifth, Eighty and Fourteenth Admendments to the United States Constitution."

Upon examining the entire instruction, the Court notes that the trial court gave the Florida Standard Jury instruction. Appendix A at 941-945. However, in addition

to the Florida Standard Jury Instructions, the trial court gave an additional instruction which made it clear that the jury must find that the aggravating circumstances outweigh the mitigating circumstances. Appendix A at 945-946.[5] Examining this instruction as a whole, the Court does not believe that the burden of proof was shifted to Arango in violation of his constitutional rights and so finds as a matter of fact and law.

D. (1) THE TRIAL COURT ERRED IN ADMITTING TESTIMONY FROM THE MEDICAL EXAMINER ALLEGED TO BE IRRELEVANT, PREJUDICIAL AND INFLAMMATORY

As a fourth ground of the Petition for Habeas Corpus, Arango alleged that during the sentencing phase of the proceedings "highly irrelevant, prejudicial and inflammatory testimony from the Medical Examiner regarding his personal opinions of the feelings experienced by the dying victim" were presented to the jury. Petitioner asserts that the presentation of such testimony was violative of his right to a fair trial and to due process of law as provided in the Sixth and Fourteenth Amendments to the United States Constitution. Petitioner further claims that the imposition of the death sentence in light of

the testimony of the Medical Examiner would be violative of his Eighth Amendmennt right against cruel and unusual punishment. The Court finds that this claim raised by Arango is not cognizable in a federal habeas corpus proceeding. Whether the Medical Examiner's testimony was "irrelevant, prejudicial and inflammatory" is a state evidentiary question and beyond the scope of review by Federal Court in considering the issue on a habeas petition. It is settled law that a Federal Court may not review the trial judge's action concerning the admission of evidence. Lisenba

v. California, 314 U.S. 219, 228 (1971); Woods v. Estelle, 547 F.2d 269 (5th Cir. 1977); Pleas v. Wainwright, 441 F.2d 56 (5th Cir. 1971). As the Supreme Court has stated:

> We do not sit to review state court action on questions of the propriety of the trial judge's action in the admission of evidence .... The fact that evidence admitted as relevant by a court is shocking to the sensibilities of those in the courtroom cannot, for that reason above, render its reception a violation of due process.

Lisenba, 314 U.S. at 228-9.

The Fifth Circuit states that the mere violation of evidentiary rules does not itself invoke habeas corpus review. The Court must examine the record only to determine whether the error was of such magnitude as to deny fundamental fairness to the criminal trial, thus violating the due process clause. In analyzing "fundamental fairness" the erroneous admission of prejudicial evidence can justify habeas corpus relief if it is material in the sense of a crucial, critical and highly significant factor. Woods v. Estelle, 547 F.2d 269, 271 (5th Cir. 1977).

The Court's examination of the record leads it to conclude that if any error was committed in the admission of the Medical Examiner's testimony, it was harmless. From a reading of the testimony presented at trial, it is clear that the Doctor's opinions were based on scientific analysis and any reference he made to his personal experience served only to simplify his medical findings for the jury.

D(2). THE TRIAL COURT'S INSTRUCTION OF "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCES WAS VAGUE, INCOMPLETE AND FAILED TO ADEQUATELY CHANNEL THE JURY'S DISCRETION

Additionally, as to ground four of the Petition, Arango charges that the trial court's instruction defining the terms "especially heinous, atrocious or cruel" was inadequate in that it was vague and incomplete and that the Petitioner's requested instructions were refused.

The record indicates that the trial Court instructed the jury on Section 921.141(5)(h), Florida Statutes (1982). The trial Court instructed the jury that "[h]einous means extremely wicked or shockingly evil. Atrocious means outrageous, wicked and vile [and] cruel means designed to inflict a high degree

of pain; utter indifference to, or enjoyment of the suffering of others; pitiless." Appendix A at 943. This Section of the Statute was construed by the United States Supreme Court in Proffitt v. Florida, 428 U.S. 242 (1975). The Court said that:

> [W]hile it is arguable "that all killings are atrocious ...[s]till, we believe that the Legislature intended something 'especially' heinous, atrocious or cruel when it authorized the death penalty for first degree murder." Tedder v. State, 322 So.2d at 910. As a consequence, the court has indicated that the eighth statutory provision is directed only at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." State v. Dixon, 283 So.2d at

> 9. See also Alford v. State, 307 So.2d 433, 445 (1975); Halliwell v. State, supra, at 561. We cannot say that the provision, as construed, provides inadequate guidance to those charged with the duty of recommending or imposing sentences in capital cases.

Id. at 255-56.

Although Petitioner asserts that he requested a jury instruction as to the aggravating circumstance of "especially heinous, atrocious or cruel", Petitioner did not submit any such instructions to this Court as an exhibit, nor did any reference to the same in the trail transcript indicate that any instructions were actually requested by Arango as to

what is heinous, atrocious or cruel.

This Court finds that in light of the trial court's defining each term individually and in light of Proffitt, the instruction was neither vague, incomplete nor inadequate.

E. THE DEATH SENTENCE IMPOSED ON THE PETITIONER IS A CRUEL AND UNUSUAL PUNISHMENT AND IS "TOO GREAT"

Arango asserts as a fifth ground of his Petition that the death sentence imposed upon him is a cruel and unusual punishment in light of all the relevenat facts and it thereby contravenes the requirement of proportionality. Counsel for Petitioner

Spinkellink v. Wainwright, 578 F.2d 582, 606 (5th Cir. 1978). The record supports a finding that the trial court found the existence of an aggravating circumstance that the crime was "especially heinous, atrocious or cruel", Section 921.141 (5)(h), Florida Statutes (1982), Appendix A at 952-3, Appendix B at 149-150, so as to merit the penalty of death. Although the trial court found one of the statutory mitigating circumstances, Arango's lack of prior criminal activity, Section 921.141(6) (a), Florida Statutes (1982), the record establishes that this single circumstance was outweighed by the

requested of the Court an evidentiary hearing on the issue of whether the death penalty under Section 921.141, Florida Statutes (1982), is being applied arbitrarily and capriciously as well as disproportionately in violation of Petitioner's rights under the Eight and Fourteenth Amendments. The Court finds that such an evidentiary hearing is wholly without merit in a federal habeas petition as the standard of review by this Court is merely to determine whether the trial court and the Florida Supreme Court performed their duty of sentencing Arango under Section 921.141 with care and concern.

aggravating circumstances within the meaning of the statute. Appendix A at 951-953 and Appendix B at 149-150. In weighing aggravating and mitigating circumstances the Florida Supreme Court has repeatedly stated that the death penalty statute does not contemplate a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum. Instead, it places on the judge the task of weighing all the factors to determine whether the death sentence is appropriate. Arango v. State, 411 So.2d 172 (Fla. 1982); White v. State, 403 So.2d 331 (Fla. 1981); Hargrave v. State, 366 So.2d 1 (Fla. 1978).

The Florida death penalty has been held constitutional in that it outlines standards in the form of aggravating and mitigating circumstances concerning the nature of the crime, as well as the nature of the criminal, which judges and juries are to follow in exercising their discretion as to which convicted murderers are to die for their crimes and which are to receive life sentences. Proffitt v. Florida, 428 U.S. 242 (1975); see also State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 (1974) (Section 921.141 held constitutional by Florida Supreme Court). In Proffitt, the Supreme Court said:

> [I]n Florida ... it is no longer true that there is "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." [And therefore], [on]n its face the Florida system thus satisfies the constitutional deficiencies identified in Furman v. Georgia, 408 U.S. 238 (1972).

Proffit v. Florida, 242 U.S. at 253.

The Fifth and Eleventh Circuits state that the federal courts' inquiry of a state court's sentencing procedure need not and should not entail a case-by-case comparison of the facts in a given case with the decisions of the state court in other death penalty cases. Spinkellink v. Wainwright,

578 F.2d at 606; Ford v. Strickland, 696 F.2d at 819. To provide otherwise, would allow a federal court to quarrel with the state court on its interpretation of the state's statutes. Petitioner has shown no basis for this Court to conclude that the Florida Supreme Court has failed to discharge its statutory duties responsibly and, therefore, this Court finds that the state courts acted through a properly drawn statute with appropriate standards to guide discretion and such discretion was accomplished with care and concern.

F. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE AT TRIAL WHICH HAD BEEN OBTAINED AS THE RESULT OF AN UNLAWFUL, WARRANTLESS ENTRY INTO PETITIONER'S APARTMENT

Petitioner's final assertion is that the search of his apartment and the seizure of evidence therein by the arresting police officers violated his Fourth Amendment rights.

In Stone v. Powell, 428 U.S. 465 (1976), the Supreme Court limited the scope of federal court review of such a Fourth Amendment issue on a habeas corpus petition filed by a state prisoner. The inquiry before this Court is limited to a finding of whether or not Arango was afforded

an opportunity to fully and fairly litigate his claim in state court. Id. at 494. Counsel for Petitioner has represented to this Court, and the record indicates, that this identical issue was fully and fairly litigated during the state proceeding in a motion to suppress hearing by the Florida Supreme Court and affirmance of that ruling. Appendix A at 365-401. Given this representation and mindful of the dictates of the Stone case, the Court inquired of Arango's counsel why he should not be precluded from raising the issue before this Court. Counsel responded that the rule of Stone v. Powell could

be circumvented upon a finding of exigent circumstances or fundamental error.

The Court has been directed to no authority to support this contention. However, in this Court's opinion, no circumstances exist here to warrant circumventing the dictates of Stone and no fundamental error exists.

Based upon the above and foregoing and the Court's determination adverse to the Petitioner's position as set forth in this Memorandum Opinion, it is ORDERED AND ADJUDGED as follows:

1. That this Court has jurisdiction over the parties and the subject matter as pertains to the issues heretofore referred to in this Court's Opinion on the grounds that as to each of said issues the Petitioner has exhausted his state remedies.

2. That this Court finds as a matter of law that as to each of the grounds asserted for the issuance of this Court's "Great Writ of Habeas Corpus" that the same are without merit based upon this Memorandum Opinion which this Court's findings of fact and conclusions of law.

/

3. That the Petition for issuance of this Court's "Great Writ of Habeas Corpus" be and the same is hereby DENIED and this cause be and the same is hereby dismissed with prejudice.

4. That in view of the notification to this Court by the Honorable Sid White, Clerk of the Supreme Court of Florida, that that Court has issued a stay of execution staying the Governor's warrant for imposition of the death penalty as pertains to the Petitioner issued April 6, 1983, the requested stay of execution is now moot; however, based solely on the record before it and the issues

presented as set forth in this Memorandum Opinion this Court would not issue a stay of execution.

DONE AND ORDERED in Chambers, at Miami, Florida this 6 day of May, 1983.

/s/ Eugene P. Spellman
EUGENE P. SPELLMAN
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Sharon B. Jacobs, Esq.
Penny Brill, Esq.

FOOTNOTES BY THE COURT

[1]Although it is not before this Court, it should be noted that Arango filed a motion for post-conviction relief in the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, pursuant to Fla.R. Crim.P. 3.850. Arango has appealed to the denial of his motion for post-conviction relief and has filed a petition for writ of habeas corpus in the Florida Supreme Court. Oral argument has been scheduled for the appeal and the petition for May 2, 1983 at 9:30 a.m. Of course, the issues raised in the motion for post-conviction relief and the petition for writ of habeas corpus now pending oral argument before the Florida Supreme Court are not the subject of the Petition for Writ of Habeas Corpus at issue before this Court to which this opinion directs itself.

[2]This Court conducted an emergency hearing on April 27, 1983. At that time, the Court requested the parties to provide it with a complete record of all proceedings relevant to the issues before it. Subsequent to that time, the Attorney General's office delivered to this Court the entire record of transcripts on appeal.

This record contained the following exhibits: A, part I, II and III, B, C, D, E, F, G, H, I, J, K, L and M hereinafter Appendix A, B., etc. at ____. The Court also received from the Attorney General's office a response to the Petitioner's Petition for Writ of Habeas Corpus.

[3]The Court notes that in Booker v. Wainwright, Case No. 82-5468, Slip Op. 2633 (11th Cir., April 25, 1983), the Eleventh Circuit Court of Appeals rejected Petitioner's contention that the Florida Supreme Court's solicitation of ex parte psychological material concerning Petitioner was unconstitutional. The Court citing Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc) indicated that "Booker's attorney was furnished with the Florida Supreme Court's request of Booker's presentence investigation report, thus rendering this factual situation weaker than Ford." Booker, supra, at 2644. This Court notes that Arango's case appears even weaker than Booker's case, there being no indication that any nonrecord information whatsoever was furnished to the Florida Supreme Court.

[4]Mr. Alvarez' voir dire examination appears at Appendix A at 15-17, and again at 97-105.

[5]The entire instruction given by the trial court with regard to this aspect of the case appears at Appendix A at 941-947.

Luis Carlos ARANGO, a/k/a Carlos Luis Arango, Florida Inmate No. 075042, Petitioner-Appellant,

v.

Louie L. WAINWRIGHT, Secretary, Florida Department of Corrections, Respondent-Appellee.

No. 83-5421.

United States Court of Appeals, Eleventh Circuit.

Sept. 23, 1983.

State death-row prisoner appealed from a decision of the United States District Court for the Southern District Court of Florida, Eugene P. Spellman, J., 563 F. Supp. 1181, denying his

petition for writ of habeas corpus. The Court of Appeals held that in interests of judicial economy, federal habeas corpus proceeding would be held in abeyance until all of claims petitioner wanted to assert were exhausted and brought before federal court.

Vacated and remanded.

Habeas Corpus 45.3(1)

In interests of judicial economy, federal habeas corpus proceeding would be held in abeyance until all of claims petitioner wanted to assert were exhausted and brought before federal court where petitioner had not waived

claims being simultaneously asserted in state court, state court proceeding could potentially moot federal proceeding, past experience in death cases indicated that if relief was denied in state court, petitioner would assert those claims in successive petition in federal court and would probably incorporate some of claims which were subject of pending petition, and there was no time limitation within which successive petition would have to be filed.

Appeal from the United States District Court for the Southern District of Florida

Before RONEY, FAY and ANDERSON, Circuit Judges.

BY THE COURT:

This is an appeal from the denial, 563 F.Supp. 1181, of a petition for writ of habeas corpus filed on behalf of Petitioner, Luis Carlos Arango, pursuant to 28 U.S.C.A. § 2254, which petition asserts six grounds for constitutional error in Arango's conviction for murder and sentence to death.[1]

1. (1) wrongful exclusion of prospective juror who did not make it unmistakably clear

(Footnote 1 continued)

he would vote against the death penalty regardless of the facts (Witherspoon);

(2) the unconsitutional shifting of the burden of persuasion to Petitioner in the trial court's instructions to the sentencing jury on the question of whether mitigating circumstances outweighed aggravating circumstances;

(3) wrongful admission of expert testimony introduced to establish tat the crime was "especially heinous, atrocious, or cruel";

(4) the imposition of a disproportionate penalty;

(5) the Florida Supreme Court's ex partie review of nonrecord information in capital appellants' case (the Brown issue); and

(6) his sentence is deprived of legitimacy because of the public's perception of the apparent impropriety of the Florida Supreme Court review of nonrecord information in certain capital cases.

After this case was scheduled for oral argument, it came to the Court's attention that Petitioner is pursuing in state court other claims attacking the constitutionality of his conviction and sentence. The Supreme Court of Florida has decided eight of these claims against him.[2] Arango v. State and Arango v. Wainwright, Case Nos. 63,562; 63,563, ___So.2d___ (Fla. Sept. 1, 1983. The Florida court remanded the case to the state trial court for an evidentiary hearing on an alleged Brady violation.

2. Petitioner urged that he received ineffective assistance of counsel on direct appeal and,

(Footnote 2 continued)

in support, cited nine issues which his counsel failed to raise on appeal. Listed below are the eight issues the court found to be without merit.

(1) denial of Petitioner's motions for mistrail and to voir dire a juror because the judge and juror smiled during Petitioner's testimony;

(2) refusal of judge to permit introduction of newspaper clippings in mitigation showing that murder victim was notorious Mafia figure;

(3) improper consideration of a non-statutory aggravating factor not supported by evidence.

(4) indictment violated sixth amendment and due process clause of the fourteenth amendment by not including aggravating factors to be considered;

(5) the Florida death penalty statute, facially and as applied, violates the fifth, sixth, eighth, and fourteenth amendments by failing to channel jury discretion

(Footnote 2 continued)

and by permitting irrelevant factors into the sentencing process by jury and judge;

(6) the death sentence violated the sixth, eighth, and fourteenth amendments in that incorrect jury instructions were given and correct jury instructions were refused;

(7) imposition of the death sentence after Petitioner rejected a plea bargain offer of life imprisonment violated the sixth, eighth, and fourteenth amendments;

(8) Petitioner's due process rights to a fair and impartial jury was violated in that the jury which recommended the death penalty was composed of jurors who favored the death penalty and who had already rejected his trial defenses as to guilt and formed an unfair and prejudicial mindset.

Prior to the Florida Supreme Court's decision, none of these claims could have properly been considered by a federal court because Petitioner had not exhausted his state remedies. 28 U.S.C.A. §§ 2254(b),(c). The Brady claim still pending in the state court could not be presented at this time to the federal court. If the unexhausted claims had been alleged, the district court, would have been required to dismiss the petition containing both exhausted and unexhausted claims. Rose v. Lundy, 455 U.S. 509, 522, 102 S.Ct. 1198, 1205, 71 L.Ed.2d 379 (1982).

Under Rose, the Petitioner then could have amended to present only exhausted claims, or returned to the state court for exhaustion prior to bringing the federal petition. The failure to include unexhausted claims could, however, cause the Petitioner to lose the opportunity to litigate in the future the unexhausted claims. 455 U.S. at 520, 102 S.Ct. at 1204.

This Court knows certain things: (1) Petitioner has not waived the claims being asserted in state court; (2) the state court proceeding could potentially moot this federal proceeding; (3) past experience in

death cases indicates that if relief is denied in the state court, Petitioner will assert those claims in a successive petition in federal court and will probably incorporate some of the claims here asserted; (4) there is no time within which such a successive petition would have to be filed, so that what is being done on this appeal might require reconsideration on a second petition.

In the interests of judicial economy, this federal proceeding should be held in abeyance until all of the claims Petitioner wants to assert are exhausted and brought

before a federal court. In order to avoid the repetition and delays that can occur in these proceedings, the Court enters the following order:

The judgment of the district court is hereby VACATED and the case is REMANDED to the district court to be held in abeyance until the exhaustion of the claims asserted in the present state proceedings.

The Petitioner is given 10 days after the claims presently pending in state court have been exhausted within which to move to dismiss this case as moot or to amend his petition to include all claims he wishes to raise before the federal courts.

The district court shall expeditiously conduct such proceedings as may be appropriate on these other issues, and supplement its prior order to include a decision on all claims presented not heretofore decided.

Upon the entry of a final judgment in the district court, either party may promptly pursue an appeal to this Court. The appeal shall be expedited. The parties shall file supplemental briefs only, the present briefs to be used on all issues presently pending before this Court.

VACATED AND REMANDED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-1077-Civ-EPS

LUIS CARLOS ARANGO a/k/a
CARLOS LUIS ARANGO,
Florida Inmate No. 075042,

Petitioner,

v.

LOUIE L. WAINWRIGHT, Secretary
Florida Department of Corrections,

Respondent.

_____/

ORDER

THIS CAUSE is before the Court on Petition For Writ of Habeas Corpus, Application For Stay of Execution and Motion For Continuance along with supporting memorandums of law and exhibits filed on behalf

of Petitioner, LUIS CARLOS ARANGO a/k/a CARLOS LUIS ARANGO. Having conducted an emergency hearing on the above Motions at 7:00 p.m., Wednesday, April 27, 1983 and having reviewed the record and being otherwise duly advised, it is hereby

ORDERED AND ADJUDGED as follows:

1.) The Office of the Attorney General of the State of Florida shall respond to the above Motions by 12:00 Noon, Friday, April 29, 1983. The Attorney General's response shall be accompanied by a complete record of all the relevant state court proceedings.

2.) The Motion For Continuance is DENIED.

3.) A hearing on the issues framed in the Petition For Writ of Habeas Corpus is hereby set for 9:30 a.m., Saturday, April 30, 1983.

4.) A Stay of Execution is GRANTED until 6:59 a.m., Tuesday, May 3, 1983, only with regard to the issues in this petition.

5.) At the present time there are several issues pending before the Supreme Court of Florida. These issues are set for argument at 9:00 a.m. Monday, May 2, 1983. Subsequent to petitioner exhausting his state court remedies and filing the appropriate petition For Writ

Of Habeas Corpus as to these issues, this Court will conduct a hearing. Said hearing is tentatively scheduled for 2:00 p.m., Monday, May 2, 1983.

DONE AND ORDERED this 29 day of April, 1983.

/s/ Eugene P. Spellman
UNITED STATES DISTRICT JUDGE

cc: Sharon B. Jacobs, Esq.,
Steven E. Chaykin, Esq.,
Penny Brill, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 83-1077-CIV-EPS

LUIS CARLOS ARANGO a/k/a
CARLOS LUIS ARANGO,
Florida Inmate No. 075042,

Petitioner,

v.

LOUIS L. WAINWRIGHT, Secretary,
Florida Department of Corrections,

Respondent.

_____/

ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS SUBJECT TO MEMORANDUM OPINION CONTAINING FINDINGS OF FACT AND CONCLUSIONS OF LAW HEREINAFTER TO BE FILED

THIS CAUSE came before the Court on the Petition for Habeas Corpus filed by the Petitioner herein challenging his first degree murder conviction and the imposition

of the death penalty. The facts pertaining to this matter will be hereinafter more fully set forth in this Court's Memorandum Opinion to be filed with the Clerk of this Court which will likewise constitute this Court's Final Order in the above-styled cause.

For the purposes of this Order, it should be noted that this Petition for Habeas Corpus was filed at a time when the Governor of this State had issued his warrant for the imposition of the death sentence against the above-named Petitioner during the week beginning at noon, April 29, 1983 and ending at noon, May 6, 1983

which Petition asserted numerous constitutional grounds which have been fully exhausted and which are more fully set forth in the aforesaid Memorandum Opinion.

As a result of the urgency of this matter, this Court issued a stay preventing imposition of the death penalty prior to the date upon which it had been set, to-wit: 7:00 a.m., May 3, 1983 and conducted a full hearing on April 30, 1983 for a period of several hours, part of which included a brief evidentiary hearing.

This Court had urgently attempted to meet the aforesaid deadline of preparing and filing

its Memorandum Opinion based on its conclusions that the Petition for the Great Writ of Habeas Corpus was totally without merit so that the Petitioner would have the opportunity of seeking appellate review and possible subsequent stay of execution before either the Eleventh Circuit Court of Appeals or the United States Supreme Court. During the course of preparation of said Memorandum Opinion denying relief, this Court was informed by the Clerk of the Supreme Court of Florida that a stay had been entered of Petitioner's execution based on post-trial and post-appellate proceedings then pending

before said Florida Supreme Court obviating the necessity and need for the filing of said Opinion prior to 7:00 a.m., May 3, 1983.

Based upon the above and foregoing and the Court's determination adverse to the Petitioner's position as set forth in the Memorandum Opinion hereinafter to be filed, it is ORDERED AND ADJUDGED as follows:

1. That this Court has jurisdiction over the parties and the subject matter as pertains to the issues heretofore referred to in this Court's Opinion on the grounds that as to each of said

issues the Petitioner has exhausted his state remedies.

2. That this Court finds as a matter of law that as to each of the grounds asserted for the issuance of this Court's "Great Writ of Habeas Corpus" that the same are without merit based upon the said Memorandum Opinion of this Court which this Court will treat in its entirety as this Court's findings of fact and conclusions of law.

3. That the Petition for issuance of this Court's "Great Writ of Habeas Corpus" be and the same is hereby DENIED and upon the filing of this Court's Memorandum Opinion and Order a Final Order of

Dismissal of this cause will be entered.

4. That in view of the notification to this Court by the Honorable Sid White, Clerk of the Supreme Court of Florida, that the Court has issued a stay of execution staying the Governor's Warrant for imposition of the death penalty as pertains to the Petitioner issued April 6, 1983, there is no further need for this Court to act upon said requested stay of execution except that it would be the finding of this Court based solely on the record before it and the issues presented as set forth in the Memorandum Opinion of this Court to

be hereinafter filed, that this Court would not issue a stay of execution; and, being of the opinion that as to each of the issues raised the same are totally without merit, a certificate of probable cause would be and shall hereinafter be denied.

DONE AND ORDERED in Chambers, at Miami, Florida this 2 day of May, 1983.

/s/ Eugene P. Spellman

UNITED STATES DISTRICT JUDGE

Copies to all parties

Luis Carlos ARANGO, a/k/a Carlos Luis Arango, Florida Inmate No. 075042, Petitioner-Appellant.

v.

Louie L. WAINWRIGHT, Secretary, Florida Department of Corrections, Respondent-Appellee.

No. 83-5421.

United States Court of Appeals, Eleventh Circuit.

July 31, 1984.

After the Court of Appeals, 716 F.2d 1353, vacated denial of habeas corpus relief by the United States District Court for the Southern District of Florida, Eugene P. Spellman, J., 563 F.Supp. 1181, the state petitioned for rehearing. The Court

of Appeals held that vacation of denial of habeas corpus relief and remand to District Court to wait until collateral claims in state court either rendered federal claims moot or were exhausted so that they could be joined with federal petition if petitioner so desired did not create precedent by which death-sentence petitioners could implement delaying and dilatory tactics.

Petition denied.

Appeal from the United States
District Court for the Southern
District of Florida

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING
EN BANC

(Opinion September 23, 1983, 11 Cir., 1983, 716 F.2d 1353).

Before RONEY, FAY and ANDERSON, Circuit Judges.

BY THE COURT:

In this case, because of special circumstances known to the Court, we vacated the denial of habeas corpus relief, 563 F.Supp. 1181, and remanded the case to the district court to wait until collateral claims in the

state court either rendered the federal claims moot or were exhausted so that they could be joined with the federal petition, if the petitioner so desired.

[1] The State's petition for rehearing suggests that the action taken in this case creates a precedent by which death sentence petitioners can implement delaying and dilatory tactics inconsistent with the thrust of such decisions as in Rose v. Lundy, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), Barefoot v. Estelle, ___ U.S. ___, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), and Galtieri v. Wainwright, 582 F.2d 348 (5th Cir. 1978) (en banc).

The decision, in this case should be of little use in accomplishing such a purpose. A stay of execution of the state judgment is not involved in this case. This decision should furnish no authority upon which to base a federal stay of execution while a petitioner exhausts unasserted claims. It does not suggest that a petitioner can pursue exhausted claims and at the same time not waive unasserted, unexhausted claims. Nor does this decision indicate the state somehow loses its opportunity to assert successive petition defenses if known but unasserted claims are later brought to the federal court. It

does not decide whether a federal court could err in dismissing a petition asserting only exhausted claims where the petitioner refuses to waive unasserted claims which are being actively pressed in the state courts. Any time that a district court knows a petitioner is attempting to piecemeal claims to delay ultimate termination of litigation, the law as to the abuse of the writ might well involve first petitions as well as successive petitions. This case does not touch on those issues.

[2] When a district court is presented with a federal habeas corpus petition raising only exhausted claims,

the court is not required to grant a continuance if the petitioner has other claims still pending in state court. Thompson v. Wainwright, 714 F.2d 1495, 1500 (11th Cir. 1983). The court can treat the petition and motion for continuance as, in effect, presenting a mixed petition and dismiss it. See Rose v. Lundy, 455 U.S. 509, 518-19, 102 S.Ct. 1198, 1203-04, 71 L.Ed.2d 379 (1982). In the alternative, the petitioner can waive his right to federal habeas corpus relief on the unexhausted claims.

The law concerning these issues is unaffected by the handling of this case, where a state court has been sufficient merit in an unexhausted

claim to direct an evidentiary hearing, and where no federal stay of execution is involved.

The decision in this case was based on the unusual circumstances of this case, grounded in judicial economy and with full knowledge that a decision on this appeal might not terminate this litigation and might be rendered moot.

The petition for rehearing is DENIED, and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of

Appellate Procedure, Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

Carlos Luis ARANGO, Appellant,

v.

The STATE of Florida, Appellee.

Carlos Luis ARANGO, Petitioner,

v.

Louie L. WAINWRIGHT, Secretary,
Florida Department of Corrections,
Respondent.

Nos. 63562, 63563.

Supreme Court of Florida,

Sept. 1, 1983.

Petitioner, who was convicted of first-degree murder and sentenced to death sought writ of habeas corpus and stay of his execution pending final disposition of writ. By separate application, he petitioned for stay of execution and extraordinary relief

to remedy alleged violations of Brady and international law. Petitioner also appealed the denial by the Circuit Court, Dade County, Robert M. Deehl, J., of his motion for post-conviction relief. The Supreme Court held that: (1) petitioner was not denied ineffective counsel on direct appeal; (2) State's failure to preserve exculpatory evidence and issues which were either raised, or could have been raised, on appeal did not present issues appropriate for post-conviction relief challenges; (3) post-conviction relief judge did not err in failing to attach portions of files and records

conclusively showing that petitioner was entitled to no relief, since petitioner was granted hearing, and such attachment is required only if no hearing is held; (4) imposition of death penalty would not violate international law; but (5) petitioner was entitlted to hearing on State's failure to make him aware of pistol, which was allegedly exculpatory evidence.

REMANDED.

McDonald, J., concurred specially and filed opinion in which Overton, J., joined.

Adkins, Boyd, Ehrlich, JJ., concur to portions of opinion denying habeas

corpus and affirming denial of the 3.850 motion, but dissent to remanding for hearing on Brady violation.

Sharon B. Jacobs and Steven E. Chaykin of Chaykin, Karland & Jacobs, Coral Gables, for appellant/petitioner.

Jim Smith, Atty. Gen., and Penny Hershoff Brill and Carolyn M. Snurkowski, Asst. Attys. Gen., Miami, for appellee/respondent.

PER CURIAM.

Arango was convicted of first-degree murder and sentenced to death in July, 1980. We affirmed the conviction and sentence on direct appeal. Arango v. State, 411 So.2d 172 (Fla.), cert. denied, 457 U.S. 1140, 102 S.Ct. 2973,

73 L.Ed.2d 1360 (1982). Arango petitions for a writ of habeas corpus on the ground that he was denied effective assistance of counsel on direct appeal and for a stay of his execution pending final disposition of his petition for writ of habeas corpus. By separate application, he petitions for a stay of execution and extraordinary relief to remedy alleged violations of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and international law. Arango also appeals the denial of his rule 3.850 motion for post-conviction relief. We have jurisidction. Art. V, § 3(b)(7) & (9), Fla. Const. We deny the petition for writ of habeas corpus based on

neffective assistance of counsel and the application for extraordinary relief based on violation of international law, affirm the denial of the rule 3.850 motion, and remand for a hearing on the Brady violation.

HABEAS CORPUS

Petitioner urges that he received ineffective assistance of counsel on direct appeal and, in support, cites nine issues which his counsel failed to raise on appeal:

1. Denial of petitioner's motion to dismiss when state failed to preserve and make available physical evidence which would have proven innocence.

2. Denial of petitioner's motions for mistrial and to voir dire a juror because the judge and juror smiled during petitioner's testimony.

3. Refusal of judge to permit introduction of newspaper clippings in mitigation showing that murder victim was notorious Mafia figure.

4. Impropr consideration of a non-statutory aggravating factor not supported by evidence.

5. Indictment violated sixth amendment and due process clause of the fourteenth amendment by not including aggravating factors to be considered.

6. The Florida death penalty statute, facially and as applied, violates the fifth, sixth, eighth, and fourteenth amendments by failing to channel jury discretion and by permitting irrelevant factors into the sentencing process by jury and judge.

7. The death sentence violated the sixth, eighth, and fourteenth amendments in that incorrect jury instructions were given and correct jury instructions were refused.

8. Imposition of the death sentence after petitioner rejected a plea bargain offer of life imprisonment violated the sixth, eighth, and

fourteenth amendments.

9. Petitioner's due process right to a fair and impartial jury was violated in that the jury which recommended the death penalty was composed of jurors who favored the death penalty and who had already rejected his trial defenses as to guilt and formed an unfair and prejudicial mindset.

We find that all of petitioner's arguments are without merit and that only points 1 and 4 require discussion.

Petitioner contends that he was denied effective assistance of counsel because his lawyer failed to appeal the trial court's denial of his motion

to dismiss based on the state's acknowledged failure to preserve a bloody yellow shirt discovered in petitioner's apartment following the murder. Petitioner's position is that the loss of the shirt by the state constituted a Brady violation and had the shirt been presented at trial, it would have corroborated petitioner's statement that the shirt had been left behind by one of three assailants who petitioner avers murdered the victim.

[1,2] A Brady violation is normally predicated on the defendant's not knowing of the withheld evidence. Where defendant is aware of the

evidence before or during trial, the appropriate action is a motion to compel discovery or a motion to dismiss. Petitioner became aware of the loss of the shirt during trial and moved to dismiss based on its loss. Although there is a possibility that admission of the shirt might have helped the defense, we are not persuaded that failure to raise the issue on appeal constitutes ineffective assistance of counsel. The facts of the case show that the murder occurred in petitioner's apartment, that the shirt was in a bathroom sink, and that there was evidence that petitioner had, at least partially, changed his clothes and

attempted to clean himself prior to the arrival of the police. Under these circumstances, and in view of other evidence that petitioner committed the murder, the trial court's denial of his motion to dismiss predicated upon the state's admitted loss of the shirt is not such that failure to appeal its denial amounts to ineffective counsel.

[3] Petitioner also claims that the trial judge improperly considered a non-statutory aggravating factor which was not supported by any evidence. The basis for this claim is in the trial judge's finding of fact relative to aggravating circumstances.

(H) That the murder of which the defendant has been convicted was especially heinous, atrocious or cruel. That the record amply shows that the defendant did beat the victim, Jario-Arango Posada, with a blunt instrument many times about the head and body, causing deep lacerations and tremendous bleeding; that the victim was struck severely between his legs, almost severing his sexual organ; that the defendant placed televsion remote control wire around the victim's neck

chocking him and balled up a towel and stuffed it into his throat, blocking his air passages; that after severe beating and strangulation, two gunshot wounds were placed in the victim's head. The record further shows that the defendant acted in a premeditated, senseless and cruel manner that is indicative of the unreasonable, unlawful and violent nature of this defendant in the especially heinous, atrocious murder of Jario-Arango Posada.

Petitioner urges that the last sentence of the quote is a separate non-statutory aggravating circumstance bearing on petitioner's conduct prior to the murder and that failure to raise this issue on appeal constituted ineffective assistance of counsel. We disagree. The sentence bears on the judge's finding that the murder was especially heinous, atrocious, or cruel and contains no error. We have previously affirmed the death sentence on direct appeal based on a finding of a single aggravating circumstance, especially heinous, atrocious, or cruel. Arango at 174-75. There was no ineffective assistance of counsel for

failure to raise the issue. See Thomas v. State, 421 So.2d 160 (Fla. 1982).

APPEAL (3.850 MOTION)

[4] Appellant urges that the trial court erred in denying his motion: (1) in the face of uncontradicted evidence that the state failed to preserve exculpatory evidence; (2) in view of the thirteen substantive issues raised by appellant; and (3) without an evidentiary hearing or without attaching the portion of the files and records conclusively showing that appellant was not entitled to relief.

On point one, we have previously noted that the state's failure to preserve the allegedly exculpatory evidence, a bloody yellow shirt, was known to appellant during the course of the trial and that the trial court denied appellant's motion to dismiss based on the state's loss of the evidence.

On point two, the record reflects that all of the thirteen substantive issues raised by appellant were either raised, or could have been raised, on appeal. Thus, neither points one nor two present issues appropriate for rule 3.850 challenges. See Raulerson v. State, 420 So.2d 567 (Fla. 1982).

Point three merits discussion.

On January 3, 1983, appellant's counsel filed an unverified motion for post-conviction relief. Said motion was scheduled for hearing March 9, 1983, but was indefinitely postponed at the request of appellate counsel until she could obtain verification by appellant. The delay in obtaining verification was attributed to a language barrier. (Appellant speaks only Spanish). On April 6, 1983, the Governor signed a warrant directing that appellant be executed during the week of April 29, 1983. Thereafter, appellant's counsel filed an amendment to the motion for post-conviction relief and ancillary

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motions seeking a declaration of indigency, appointment and payment of a translator, experts (attorneys), investigators, and counsel, a stay of the execution, and an evidentiary hearing. Appellant was transported to Dade County and a hearing scheduled for April 21, 1983. On that date, appellant verified his motion for post-conviction relief.

At the rule 3.850 hearing, presided over by the original trial judge, appellant maintained that his ancillary motions should first be granted. The trial judge declined to do so until appellant came forth with preliminary evidence that the claimed ineffective assistance of counsel did

did not result from trial strategy and tactics. Despite the presence at court of the former, allegedly ineffective, counsel, subpoenaed by the state, and contrary to the suggestion of the state and the court, appellant refused to call former counsel and objected to the state doing so. Appellant's position was that he was not prepared for an "evidentiary" hearing on his motion for post-conviction relief and could not prepare for such hearing unless his ancillary motions were granted. Having reached impasse, the trial judge reviewed the standards for post-conviction relief from Knight v. State, 394 So.2d 997 (Fla. 1981), and ruled

that appellant had not supported his motion.

We have reviewed the various points raised by appellant in his motion for post-conviction relief, as amended, and agree with the trial judge that the specific omissions or overt acts are either explainable on their face as trial tactics or do not otherwise show ineffective assistance of counsel. Appellant met the first prong of the four-part test set forth in Knight by detailing the specific omission or overt act on which his claim was based, but failed entirely "to show that this specific omission or overt act was

a substantial and serious deficiency measurably below that of competent counsel." Id. at 1001.

[5] Appellant is apparently laboring under a misapprehension of his burden under Knight and the purpose of a rule 3.850 hearing. When a motion for post-conviction relief is filed, the presiding judge may: (1) determine that the motion itself is legally insufficient and deny the motion without a hearing; (2) determine that the files and records in the case conclusively show that the prisoner is entitled to no relief and deny the motion without a hearing, attaching a copy of the portion of the

files and records conclusively showing no entitlement to relief; or (3) determine that a hearing is required for disposition of the motion.

[6] In the instant cause appellant was afforded a hearing but complains that it was illusory and unduly restrictive because of the judge's refusal to first grant his ancillary motions. Appellant's counsel refused to put on any preliminary evidence to support either the motion for post-conviction relief or the ancillary motions, despite the fact that both the appellant and the allegedly ineffective former counsel were present and available. We approve the trial

judge's determination that preliminary supporting evidence was necessary before he could realistically consider granting the various ancillary motions. The burden was on the appellant to support his pending motions. We, of course, have no opinion as to what the trial judge might have ruled had appellant or appellant's former counsel been called to testify, but the judge cannot be faulted for appellant counsel's tactical decision not to use the hearing to present probative evidence.

[7] We also take this opportunity to comment on what we consider to be the all too frequent, and

questionable practice of waiting until the eleventh hour to raise or prosecute issues which could have and should have been raised months or years before. The unverified motion for post-conviction relief was filed on January 3, 1983. The four-month delay in verifying the motion and scheduling it for hearing until just prior to the scheduled execution week can be described at best as dilatory and, at worst, as an abuse of process. Essentially, appellant appeared at the April 21, 1983, hearing unprepared to carry the Knight burden, demanding instead that he be granted a stay of execution and the appointment of

investigators and experts in the speculative expectation that he might be able at some unknown future date to develop evidence to support the motion for post-conviction relief. We condemn such tactics as unworthy of the legal profession. Spenkelink v. Wainwright, 372 So.2d 927 (Fla. 1979) (Alderman, J., concurring specially).

[8] Appellant also urges that the trial judge erred in failing to attach portions of the files and records conclusively showing that the appellant was entitled to no relief. Such attachment is only required if no hearing is held. Petitioner was granted a hearing.

The motion was denied after the hearing at which petitioner failed to either meet prong two, or three, of Knight or to support his ancillary motions for a stay of the execution and additional time and resources. We have reviewed the transcript of the hearing and find it comports with due process.

APPLICATION FOR EXTRAORDINARY RELIEF

We see no merit in petitioner's argument that imposition of the death penalty on him would violate international law.

[9] At trial, petitioner testified that he and the victim were overpowered by three assailants who

murdered the victim and fled prior to the arrival of the police. Petitioner now urges that he has recently discovered, on approximately April 23, 1983, that a semi-automatic pistol was found on the day following the murder under the balcony of petitioner's apartment, and was turned over to the police investigating the murder. Petitioner urges that this evidence was exculpatory and that the state failed to produce this evidence despite his discovery motion which specifically requested, inter alia:

> 3. Any physical evidence or witness statements which corroborate the Defendant's

statements to Detective Diaz that other Latin males entered the apartment and committed the homicide.

The state acknowledges that it did not make petitioner aware of this evidence but maintains that the pistol was unrelated to this case and, thus, was not disclosed. We express no views on the merits but petitioner has made a prima facie case which requires a hearing. We remand to the trial court for the purposes of conducting a hearing on the claimed Brady violation. (Our stay of execution

granted on May 2, 1983, remains in effect pending the outcome of the hearing.

It is so ordered.

ALDERMAN, C.J. and SHAW, J., concur.

McDONALD, J., concurs specially with an opinion in which OVERTON, J., concurs.

ADKINS, BOYD and EHRLICH, J.J., concur to portions of opinion denying habeas corpus and affirming denial of the 3.850 motion, but dissent to remanding for a hearing on the Brady violation.

McDONALD, Justice, specially concurring.

I concur in all parts of the opinion except that portion that denies an evidentiary hearing on Arango's 3.850 motion. In addition to the relief afforded Arango in the opinion, he should be authorized to present evidence of ineffective assistance of counsel at the sentencing proceeding. In addition, I would go somewhat further because I also feel that he is entitled to an evidentiary hearing on the effectiveness of counsel at the sentencing proceeding. To me this did not appear to be an appropriate

death sentence case, and, had available nonstatutory mitigating circumstances been presented, others may have reached the same conclusion.

OVERTON, J., concurs.

A.130

Luis Carlos ARANGO, Appellant,

v.

STATE of Florida, Appellee.

No. 59678.

Supreme Court of Florida.

Jan. 21, 1982.

Rehearing Denied April 8, 1982.

Affirmed.

McDonald, J., concurred in part, dissented in part, and filed opinion in which Boyd, J., joined.

Vincent J. Flynn of Flynn, Rubio & Tarkoff Miami, for appellant.

Jim Smith, Atty. Gen. and Anthony C. Musto and Joel D. Rosenblatt, Asst. Attys. Gen., Miami, for appellee.

PER CURIAM.

Arango appeals his conviction of murder

in the first degree and possession of a controled substance and his sentence of death. - He alleges that the trial court committed four errors. We find, however, that only three issues raise points that warrant discussion at any length.[1] None of the issues raised require a reversal of the trial court's judgment or sentence. Hence, we affirm appellant's convictions and sentence.[2]

In March of 1980, the Dade County police received a telephone call from the manager of a Miami apartment complex reporting a disturbance. Upon their arrival, the manager reported taht subsequent to telephoning he had heard what he thought was the sound of glass breaking. The police went upstairs and knocked on appellant's apartment door. A neighbor then motioned to them that some kind of activity was occurring at the other end of the apartment. Passing the front window, the officers observed cracked glass on the walkway and what appeared to be a bullet hole in the window. They knocked several times and, after receiving no response, entered through the unlocked kitchen door. ONce inside, they found and detained appellant. A search of the bedroom was then conducted. On the bed lay the body of the deceased, who had an electrical cord wrapped around his neck, multiple lacerations on his face, and two gunshot wounds to his head. Cocaine, pistols, and $7,800 in cash, among other items were seized from the premises.

The grand jury indicted appellant for firs-degree murder and possession of a controled substance. A motion to suppress

evidence allegedly obtained illegally was filed and later denied, the trial judge having determined that the warrantless search was justified under the circumstances.

The jury found appellant guilty of both charges and recommended the death penalty phase of the proceeding, the trial judge found the existence of one aggravating and one mitigating circumstance and imposed the sentence of death.

Appellant first contends that the trial court erred in denying his motion to suppress evidence allegedly obtained by an illegal search and seizure. He relies on Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), which held that the fourth amendment provides protection against a warrantless entry into a person's home for the purpose of making a routine felony arrest. However, the rule in Payton does not apply where there are exigent circumstances. As we have made clear in our decisions, the need to protect life and to prevent serious bodily injury provides justification for an otherwise invalid entry. This exception governs here.

As we recently held in Zeigler v. State, 402 So.2d 365 (Fla. 1981), the police may enter a dwelling without a warrant if they have credible information that a person's life may be in danger. In this case, the police acted under the reasonable belief that a person was either dead or dying inside appellant's apartment. The telephone call and subsequent report from the manager, the cracked glass and bullet hole, and the neighbor's indication of a commo-

tion were sufficient indicia of an emergency situation. Accordingly, no warrant was required, and the motion to dismiss was properly denied.

Appellant next maintains that the instructions given to the jury impermissibly allocated the constitutionally prescribed burden of proof. At one point in the trial proceeding, the judge stated that if the jury found the existence of an aggravating circumstance, it had "the duty to determine whether or not sufficient mitigating circumstances exist to outweigh the aggravating circumstances." This instruction, appellant argues, violates the due process clause as interpreted in Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975) and State v. Dixon, 283 So.2d 1 (Fla.1973) cert.denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974).

In Mullaney the Supreme Court held that a Maine law requiring the defendant to negate the existence of malice aforethought in order to reduce his crime from homicide to manslaughter did not comport with due process. Such a rule, the Court wrote, is repugnant to the fourteenth amendment guarantee that the prosecution bear the burden of proving beyond a reasonable doubt every element of an offense. In Dixon we held that the aggravating circumstances of section 921.141(6), Florida Statutes (1973), were like elements of a capital felony in that the state must establish them.

In the present case, the jury instruction, if given alone, may have conflicted with the

principles of law enunciated in Mullaney and Dixon. A careful reading of the transcript, however, reveals that the burden of proof never shifted. The jury was first told that the state must establish the existance of one or more aggravating circumstances before the death penalty could be imposed. Then they were instructed that such a sentence could only be given if the state showed the aggravating circumstances. These standard jury instructions taken as a whole show that no reversible error was committed.

Appellant also argues that the trial court erred in imposing the death penalty. ONe aggravating circumstance was found applicable here: the homicide was considered "especially heinous, atrocious, or cruel." §921.141(6)(a), Fla.Stat. (1979). He maintains that unless we are willing to recede from earlier capital cases construing this statute, his sentence of death is disproportionate punishment. Citing to Halliwell v. State, 323 So.2d 557 (Fla. 1975), Swain v. State, 322 So.2d 485 (Fla. 1975), and Taylor v. State, 294 So.2d 648 (Fla. 1974), he claims that we are compelled to reduce his sentence from death to life imprisonment.

Looking at the facts present here, we see that the cases cited by appellant are clearly distinguishable. In the instant case, the trial judge found that appellant beat the victim with a blunt instrument many times about the head and body. Deep cuts were made on the face, causing severe himorrhaging. The wire used in a TV remote control device was wrapped around the victims's neck, choking him. A large towel stuffed into the victim's mouth prevented

his breathing. After beating and strangling him, appellant shot the victim twice in the head.

Halliwell, on the other hand, involved a love triangle in which the appellant mutilated the body of the deceased several hours after the murder was completed. We reduced Halliwell's sentence from death to life imprisonment, holding that such conduct was not the kind contemplated by the legislature in providing for the consideration of aggravating circumstances. In the present case, the record shows that the beatings occurred prior to the murder, precisely the same factor we held in Halliwell was "relevant in fixing the death penalty." 323 So.2d 561.

Swan is also different because there the trial judge overrode the jury's recommendation of life imprisonment. As we have often stated, such a decision must be based on clear and convincing facts that the death penalty is appripriate. Tedder v. State, 322 So.2d 908 (fla. 1975). The state introduced no evidence showing why Swan should be electrocuted, and the record did not demonstrate facts sufficient to satisy Tedder.

Taylor, like Swan, involved a trial judge's rejection of a jury's recommendation of a life sentence. We reversed the sentence of death, finding that a multiplicity of factors could have influenced the jury to be lenient, including the possibility that the appellant was not the "triggerman" in the murder for which he was charged. In the case before us the jury, in view of only one mitigating circumstances,

recommended death. The trial judge, after considering the totality of circumstances and exercising his reasoned judgment, adopted the jury's advisory sentence.

As we said in Hargrave v. State, 366 So.2d 1, 5 (Fla. 1978), cert.denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979), the death penalty statute does not contemplate "a mere tabulation of aggravating versus mitigating circumstances to arrive at a net sum." Instead it places upon teh trial judge the task of weighing all these factors. We believe that the trial court properly performed this function.

For the reasons expressed, we affirm the convictions and sentence.

It is so ordered.

SUNDBERG, C.J., and ADKINS, OVERTON and ALDERMAN, JJ., concur.

McDONALD, J., concurs in part and dissents in part with an opinion, in which BOYD, J., concurs.

McDONALD, Justice, concurring in part/dissenting in part.

While I concur that there was no trial error, that there was sufficient evidence to sustain the conviction, and that it was the jury's function to believe or disbelieve the defendant, I do not believe that this homicide justifies the death penalty. The trial judge predicates the imposition of the death penalty on the single aggravating factor that the crime was especially

heinous, atrocious and cruel. The facts of this case do not support that finding, as we have defined it in State v. Dixon, 283 So.2d 1 (Fla. 1973), beyond a reasonable doubt. Even if they did, that single aggravating factor should not, in this case, warrant the death penalty. The defendant, a Colombian, has no past criminal record, but was a user of drugs. The deceased, also a Colombian and a friend of the appellant, was a dealer in drugs from whom the defendant had previously purchased drugs. While there is a suspicion that the parties may have been involved in a drug transaction, no one knows why this homicide was committed. Nevertheless, the circumstances sufficient to impose the death penalty. I would reduce the sentence to life imprisonment.

BOYD, Justice, concurs:

I concur in the majority opinion affirming guilt, but I concur with Justice McDonald ipinion that life imprisonment and not death is the appropriate penalty.

FOOTNOTES BY THE COURT

[1] Arango also contends that a prospective juror was improperly excused for cause. The record, however, clearly reveals that the venireman could not render an impartial decision as to appellant's guilt. See Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968).

[2] Jurisdiction vests under article V, section 3(b)(1) of the Florida Constitution, and section 921.141(4) of the Florida Statutes (1979).